Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

80-952

IN THE

Supreme Court of the United States

NO. .....

EMERSON EMORY, M.D.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Submitted by:

LAW OFFICE OF FRED TIME
A PROFESSIONAL CORPORATION

By: FRED TIME
and
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EMERSON EMORY, M.D.

QUESTION PRESENTED

Does the *Jencks Act*, 18 U.S.C. § 3500, abridge the right of an accused, guaranteed by the Sixth Amendment, to compulsory process; i.e., was Petitioner's Sixth Amendment right to compulsory process abridged when the trial court, based upon the *Jencks Act*, refused to order the prosecution to make available for his inspection and copying witness statements and investigative reports in its possession?

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I.

PRIOR OPINION

Petitioner's conviction was affirmed by the United States Court of Appeals for the Fifth District in an unpublished Opinion. A copy of the Opinion is appended hereto.

II.

JURISDICTION

Petitioner seeks review of the affirmance of his conviction by the United States Court of Appeals for the Fifth Circuit. His conviction was affirmed on October 15, 1980.

Petitioner petitioned the Court of Appeals for a rehearing. Said petition was denied on November 12, 1980.

III.

QUESTION FOR REVIEW

Does the *Jencks Act*, 18 U.S.C. § 3500, abridge the right of an accused, guaranteed by the Sixth Amendment, to compulsory process; i.e., was Petitioner's Sixth Amendment right to compulsory process abridged when the trial court, based upon the *Jencks Act*, refused to order the prosecution to make available for his inspection and copying witness statements and investigative reports in its possession?

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional and statutory provisions which are pertinent to this case are set forth verbatim below:

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

JENCKS ACT
18 U.S.C. § 3500

§ 3500. *Demands for production of statements and reports of witnesses*

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the

United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the Court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement

made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

V.

STATEMENT OF THE CASE

On May 10, 1979, the Grand Jury for the Northern District of Texas indicted Petitioner, Dr. Emerson Emory, M.D., for one count of conspiracy to procure a controlled substance by fraudulent means, in violation of 21 U.S.C. § 846, and nineteen counts of unlawfully prescribing a controlled substance in violation of 21 U.S.C. § 841(a)(1).

On June 25th Petitioner moved the trial court for an order compelling the prosecution to produce all statements of witnesses in its possession. The trial court denied that discovery motion based upon and subject to the provisions of the *Jencks Act*, 18 U.S.C. § 3500.

The trial began on July 30, 1979. On August 3rd the jury returned a verdict of guilty on all counts.

On August 9th Appellant filed his notice of appeal. The Court of Appeals for the Fifth Circuit, upon consideration of the briefs and oral argument, affirmed the conviction on October 15, 1980. On November 12, 1980 the panel denied Petitioner's Petition for a Rehearing.

VI.

THE WRIT SHOULD BE GRANTED SO THAT THIS COURT MAY SHED THE CONFUSION SUR-

ROUNDING THE FEDERAL CONSTITUTIONAL LAW OF PRE-TRIAL DISCOVERY, WHILE RESTORING TO THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT ITS APPROPRIATE CONSTITUTIONAL STATURE.

Prior to trial, Petitioner moved the trial court for an order allowing him to inspect witness statements and investigative reports in the possession of the prosecution. The text of the Sixth Amendment's compulsory process clause supported his motion. Yet, it was denied based upon a statute, the *Jencks Act*. Where there is such a conflict of authorities, the higher authority, the constitution, must prevail.

As will be seen below, the present state of the constitutional law pertaining to pre-trial discovery is in a state of confusion, patchwork disrepair. Also, as will be seen below, the *Jencks Act* is in conflict with the Sixth Amendment right to compulsory process. By granting the writ, and fully considering this case on the merits, this Court will have an opportunity to remedy both situations.

A. THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR DISCOVERY DENIED HIM HIS RIGHT TO COMPULSORY PROCESS, GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE CONSTITUTION.

1. THE COMPULSORY PROCESS CLAUSE OF THE SIXTH AMENDMENT EXTENDS NOT ONLY TO WITNESSES, BUT ALSO TO PAPERS

AND THINGS. *United States vs. Burr*, 25 F.Cas. 30, 35 (CCD, Va. 1807).

2. THE ACCUSED'S SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS OVERRIDES A CONSTITUTIONAL PRIVILEGE PURPORTING TO MILITATE AGAINST DISCLOSURE, *United States vs. Burr, supra; United States vs. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

In *United States v. Nixon, supra*, the President sought to shield from disclosure tape recordings of his confidential conversations. The Court found that there was indeed a constitutional privilege protecting the tapes; and that the privilege was grounded in the constitution on the doctrine of separation of powers. Nevertheless, the Court found that the need of the Court for the tapes outweighed the constitutional privilege against disclosure. The Court said:

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts . . . To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. 418 U.S. at 708-709.

Later, the Court noted that:

> The right to the production of all evidence at a criminal trial summarily has constitutional dimensions. The Sixth Amendment exclusively confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process in his favor . . ." It is the manifest duty of the courts

to vindicate those guarantees, and to accomplish that, it is essential that all relevant and admissible evidence be produced. *Id*, at 711.

3. THE PURPOSE OF THE COMPULSORY PROCESS CLAUSE IS TO NEUTRALIZE THE ADVANTAGE HELD BY THE PROSECUTION OVER THE ACCUSED IN ITS ABILITY TO GATHER EVIDENCE, PREPARE ITS CASF, AND PRESENT IT AT TRIAL.

The framers of the Sixth Amendment intended that it equalize the imbalance of power and resources between the Government and accused. In Weston, *The Compulsory Process Clause*, 73 Mich.L.Rev. 71 (1975), we are taught that early at common law an accused had no procedural rights. He was not informed of the charges against him until the morning of trial. He was denied the aid of counsel. He could not interview the Government's witnesses. He could not subpoena witnesses, and he could not present witnesses in his defense. 73 Mich.L.Rev. at 81-82. Gradually, these barriers to a fair trial were eroded, so that by 1702 an accused was entitled to the use of subpoena in all felony cases. That this right was viewed by the framers as an essential safeguard to an accused is seen by the fact that all of the states, save Rhode Island, incorporated it in some manner in their new constitutions. *Id*, at 94-95.

Too, the landmark decision of *United States v. Burr*, supra, would seem to have settled the issue presented now to this Court. *Burr* appears to be dispositive, not only on its facts, but on the rationales developed by Chief Justice Marshall.

Burr was charged with treason. He sought to obtain, by way of a subpoena duces tecum issued on the President of the United States, a witness statement. The government resisted disclosure on three grounds: first, that Burr had not yet been indicted, and that therefore the right to compulsory process had not yet attached; second, that the compulsory process clause extended only to witnesses and not papers and things; and third, that the President had a constitutional privilege against disclosure.

As was noted above, Chief Justice Marshall rejected the latter two contentions. So, too, he rejected the first, finding that the letter and spirit of the clause mandate that the right to compulsory process attach when an individual is brought before the bar.

Thus, the first time the compulsory process clause was construed authoritatively, it was held to include a pretrial right of discovery, a right to inspect tangible items, and a right to invade the privacy of the government.

Chief Justice Marshall said of the Sixth Amendment rights to a speedy trial and to compulsory process, that:

> The right given by this article (the Sixth Amendment) must be deemed sacred by the Courts, and the article should be construed as to be something more than a dead letter.... It is certainly much more to the true spirit of the provision which confers to the accused a speedy trial that he should have the benefit of the provisions which entitle him to compulsory process as soon as he is brought into court. 25 F.Cas. 30, 33.

Thus, the Chief Justice concluded that:

> ... [T]he court is of the opinion that any person charged with a crime in the courts of the United States, has a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses. Much delay and much inconvenience may be avoided by this construction; no mischief, which is perceived, can be produced by it. *Id*, at 34.

Burr, supra, is comprehensive. Without equivocation, it holds that the right to compulsory process attaches as soon as the criminal process has begun. Necessarily, then the compulsory process clause has a two-fold aim: First, to allow the accused to prepare his defense; and second, to allow him to present it. If this first aim were not present, the compulsory process clause would provide merely a trial right, attaching, not with the issuance of an indictment, but with the call of the case for trial. Of course, such is not the case.

B. AT PRESENT, THE CONSTITUTIONAL LAW PERTAINING TO PRE-TRIAL DISCOVERY IS RIFE WITH CONFUSION AND INCONSISTENCIES. THESE MALADIES MAY BE STRICKEN, IF THE COMPULSORY PROCESS CLAUSE, RESTORED TO ITS FULLEST CONSTITUTIONAL STATURE, IS APPLIED TO AND STRIKES THE *JENCKS ACT*.

1. ALTHOUGH THIS COURT HAS HELD THAT FUNDAMENTAL FAIRNESS REQUIRES THAT AN ACCUSED BE GIVEN LIBERAL RIGHTS OF DISCOVERY WHEN THE PROSE-

CUTION SEEKS TO FORFEIT HIS LIBERTY AT A PAROLE OR PROBATION REVOCATION HEARING, SUCH A RIGHT IS NOT ACCORDED CONSTITUTIONAL STATURE WHEN THE PROCEEDING IS A PLENARY TRIAL. *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1956 (1973).

Morrissey v. Brewer, supra, concerned a petition for writ of habeas corpus. Petitioner had been sentenced to prison upon being convicted of forgery. Seven months after being released on parole he was arrested for violating one of its conditions; and shortly thereafter his parole was formally revoked without a hearing. He petitioned the United States District Court for a writ of habeas corpus, contending that the failure of the State to provide him a hearing violated his right to due process. The trial court denied his petition, and the Court of Appeals affirmed.

This Court reversed, holding that the due process clause of the Fourteenth Amendment mandates that a parolee be granted certain procedural protections in connection with the State's motion to revoke. One such device is in the nature of a preliminary hearing, to be held to determine whether there is probable cause to believe that the parolee violated a condition of his parole. At this hearing, "on the request of the parolee, persons who have given adverse information on which parole revocation is to be based are to be made available for questioning in his presence", 408 U.S., at 487.

Toward the close of the opinion, the Court, summed up what it found to be the *minimum procedural protections* to be afforded a parolee. It said, "they include . . . (a) Disclosure to the parolee of evidence against him . . .", *Id.*, at 489.

It is noteworthy that the Court distinguished between affording to the parolee notice of the charges against him and the details of the state's case, its evidence. The former informs the parolee of the nature of the violation he is charged with committing; while the latter informs him how the State will try to prove it. Under the due process clause, both types of notice must be given to him when an effort is made to revoke his parole and forfeit his liberty.

If the validity of the *Jencks Act* is upheld, an analamous situation will continue. The *Jencks Act* prohibits an accused from inspecting copies of witness statements and investigative reports in the possession of the government if the proceeding at which it seeks to forfeit his liberty is a plenary trial. Yet, if the proceeding is but a parole or probation revocation hearing, much greater discovery rights are afforded, notwithstanding that the plenary trial is a far more serious proceeding at which much greater rights attach. [See *Gagnon v. Scarpelli*, 411 U.S. 778, 787, 36 L.Ed.2d 656, 93 S.Ct. 1956 (1973), where the Court held that an indigent probationer is not entitled to court appointed counsel to represent him in a probation revocation hearing, since such a hearing is not a "critical stage" of the criminal process.]

2. ALTHOUGH THIS COURT HAS HELD THAT FUNDAMENTAL FAIRNESS REQUIRES THE

PROSECUTION TO DISCLOSE SOME INFORMATION UNDER SOME CIRCUMSTANCES, THE RULES ARE DIFFICULT TO APPLY ON BOTH THE TRIAL AND APPELLATE LEVELS, AND EVEN YET MORE DIFFICULT TO ENFORCE. THIS PROBLEM WOULD BE ALLEVIATED BY RESTORING TO THE COMPULSORY PROCESS CLAUSE ITS FULL CONSTITUTIONAL DIGNITY.

As the court below noted, the issue presented here has not yet been resolved; yet, it involves an issue crucial to the administration of criminal justice. The language of the Sixth Amendment and Chief Justice Marshall's opinion in *United States v. Burr, supra,* appear to indicate that Petitioner's Pretrial Motion for Discovery should have been granted; while the *Jencks Act* clearly prohibited disclosure.

It cannot be said that the federal law on the rights of an accused to pretrial discovery is well settled. For, on the one hand, the *Jencks Act* seems to preclude any and all discovery of witness statements and investigative reports unless and until the particular witness testifies. Yet, if there is something in that statement that tends to be exculpatory, then it must be given to the defense by the prosecutor *sua sponte. Brady v. Maryland,* 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963). This is true whether the material is helpful to the defense on the facts, *Miller v. Pate,* 386 U.S. 1, 17 L.Ed.2d 690, 87 S.Ct. 785 (1967); or if it pertains to the credibility of a key prosecution witness, *Giglio v. United States,* 405 U.S. 150, 31 L.Ed.2d 104, 92 S.Ct. 763 (1962);

Alcorta v. Texas, 355 U.S. 28, 2 L.Ed.2d 2, 78 S.Ct. 103 (1957).

The formula used to determine if the failure of the prosecution to disclose such information was prejudicial error poses increased complications. See *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), 427 U.S., at 113.

In addition, there is more confusion when one travels to the realm of parole and probation revocations. There, the due process clause mandates that full disclosure be made notwithstanding the exculpatory or inculpatory nature of the material. Yet, when one travels to the realm of the criminal trial, where more is at stake and greater rights are supposed to be accorded, the presumption is against disclosure.

Over this patchwork background, one must layer the reality that an indictment or information seldom provides sufficient information to the accused to prepare his defense or have a full appreciation of the nature of the case against him. And layered over that reality is the very strong constitutional policy that one should be notified of the charges against him so that an adequate defense may be rendered.

Full enforcement of the Sixth Amendment's compulsory process clause, which would of course necessitate the striking of the *Jencks Act*, would bring back to this area the original constitutional simplicity which the framers intended. It would restore the balance of power between the government and the accused, putting the accused back on a more equal footing with the government so that his presumption of innocence may be kept a reality.

VII.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully submits that his Petition for Certiorari should be granted.

Respectfully submitted,

LAW OFFICE OF FRED TIME
A PROFESSIONAL CORPORATION

By: .....
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APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-5463

DO NOT PUBLISH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

EMERSON EMORY, M.D. AND
JAMES EDWARD STACKS, a/k/a Carla Stevens,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas

(OCTOBER 15, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

Appellants Emerson Emory, M.D. and James Edward Stacks were indicted for conspiracy to acquire or obtain possession of Dilaudid, a Schedule II controlled substance, by misrepresentation in violation of 21 U.S.C. §§ 843(a)(3) and 846. Dr. Emerson was also indicted on twenty counts of unlawfully dispensing Dilaudid, in violation of 21 U.S.C. § 841(a)(1). Appellant Stacks was indicted on nine counts of obtaining possession of Dilaudid by misrepresentation, in violation of 21 U.S.C. § 843(a)(3). Following pleas of not guilty and a jury trial, the appellants were convicted on all counts. Dr. Emory now raises four issues on appeal and Stacks raises two. Finding no error, we affirm.

The record indicates that Dr. Emory prescribed a total of 4300 Dilaudid tablets in individual quantities of 200 tablets from December 26, 1978, until March 29, 1979, to two individuals.

Eighteen hundred of these were prescribed to Carla Stevens and 2500 to Pam Archer. One pharmacist who had been filling these prescriptions stated that Dr. Emory had told him that these two patients were in great pain and that the prescriptions were for legitimate medical purposes. Another pharmacist who had filled some of these prescriptions stated that he had dispensed a total of at least 16,000 tablets to Stevens and Archer over a period beginning in late 1977 and ending in April of 1979. Patricia Harris, a co-conspirator who had not been apprehended at the time of trial, would present the prescriptions in the name of Pam Archer, and Stacks would present the prescriptions in Carla Stevens' name. The pharmacists also stated that they had never seen Dilaudid prescribed in 200 tablet quantities.

When questioned by a police officer, Dr. Emory admitted that some of the prescriptions from the pharmacy were his but labled others as forgeries. Dr. Emory stated that he had no patient named Carla Stevens and that he had never written a prescription for that person. He did admit that Pam Archer had been a patient of his but that he had only seen her three times in three years. Dr. Emory also stated at the time that he did not know either Stacks or Harris. At trial, however, Dr. Emory stipulated that he had written the prescriptions involved in this case.

There is also evidence in the record that Dilaudid is a synthetic derivative of morphine. An internist, who was the government's expert medical witness, stated that he knew of no legitimate medical purpose for prescription of 200 Dilaudid tablets at one time. Dr. Emory had told the police officer that questioned him that he prescribed such large doses to make it easier for patients receiving insurance and medicare benefits so they would not return as often to him.

Dr. Emory now raises four challenges on appeal: 1) insufficiency of the evidency; 2) error in the admission of testimony on specific acts of Dr. Emory; 3) error in the

trial court's failure to grant Emory's motion to sever; and 4) a claim that the Jencks Act is unconstitutional. Stacks contends that the evidence was insufficient to sustain his conviction and that the trial court erred in not granting his motion for continuance.

Dr. Emory's Jencks Act challenge is an interesting and apparently novel one. He contends that the application of the Jencks Act, 18 U.S.C. § 3500, violated his Sixth Amendment right to compulsory process as well as his right to equal protection under the Fourteenth Amendment. Dr. Emory maintains that, due to the government's use of the Jencks Act as a shield to withhold statements made by government witnesses until after they testify, he was unable to properly evaluate and prepare his defense. He also states that he has been denied equal protection due to the disparity between the criminal rules of procedure and the liberal civil rules of procedure.

Although the procedures under the Jencks Act have been declared constitutional, Scales v. United States, 367 U.S. 203, 257-58 (1961); United States v. Jackson, 452 F.2d 144, 147 (7th Cir. 1971), there apparently has been no case disposing of whether the Act violates an individual's Sixth Amendment right to compulsory process or his Fourteenth Amendment right to equal protection. Dr. Emory, however, never raised the constitutional issues in the trial court. In addition, Dr. Emory did not present evidence or make a showing on the record of any prejudice to him arising out of the government's use of the Jencks Act to withhold the witnesses' statement until after they testified. Dr. Emory also did not present any evidence or arguments in the trial court as to how such information given at an earlier time would have helped him to any greater extent.

Because the issue of the constitutionality of the Jencks Act is raised here for the first time on appeal we need not and will not reach it. Dr. Emory should have raised it below. His failure to do so and his failure to create a record in the trial court demonstrating the prejudice flowing to him

by the government's use of the Jencks Act precludes this court from determining the matter.

The court finds that the remaining issues presented by both Dr. Emory and Stacks are totally without merit. Based upon the evidence and testimony presented during the trial, there is clearly sufficient evidence to sustain the conviction. Additionally, this court sees no error or abuse of discretion in the court's rulings on the motions for severence and continuance. The court also finds no error in the trial court's admission into evidence of testimony relating to specific instances of Dr. Emory's conduct, in light of defense counsel's raising the issue of Dr. Emory's reputation in the community beforehand.

AFFIRMED.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 79-5463

U.S. COURT OF APPEALS
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GILBERT E. GANUCHEAU
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

U.S. COURT OF APPEALS
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NEW ORLEANS LA.

EMERSON EMORY, M.D. and
JAMES EDWARD STACKS,
a/k/a Carla Stevens,

Defendants-Appellants.

- - - - -

Appeals from the United States District Court for the
Northern District of Texas

- - - - -

ON PETITION FOR REHEARING

(November 12, 1980)

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Emerson Emory, M.D. in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

United States Circuit Judge

Form 703-2